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No. 75-1164

In the

Supreme Court of the United States

OCTOBER TERM, 1976

MARY FRANCES VICKERY,

Petitioner,

v.

W. J. ESTELLE, Director,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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BLEED THROUGH

No. .....

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MARY FRANCES VICKERY,

Petitioner,

v.

W. J. ESTELLE, Director,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Your Petitioner, Mary Frances Vickery, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on November 21, 1975, and on petition for rehearing on January 7, 1976.

OPINIONS BELOW

The per curiam order of the Court of Appeals, not officially reported, affirming the district court appears in Appendix A. at A-3. The per curiam order of the Court of Appeals denying the petition for rehearing, not officially reported, appears in Appendix A. at A-4. The order of the United States District Court for the Northern District of Texas, Dallas Division, appears in Appendix A. at A-1 and A-2.

JURISDICTION

The judgment of the Court of Appeals was entered on November 21, 1975. Petition for rehearing was filed December 22, 1975, and the order denying the petition for rehearing was entered on January 7, 1976. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a person in custody pursuant to a judgment of a state court who has petitioned the state court for relief from such judgment and such relief has been denied should be required to petition the state court once again on the same factual situation as raised in her first petition, but on different constitutional grounds, where the state court has recently decided a case on the same constitutional grounds raised in Petitioner's request for federal relief merely because there exists one minor point of factual dissimilarity in Petitioner's case and the recently decided case.

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment in pertinent part provides: "* * * no State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the law."

STATUTORY PROVISIONS

28 U.S.C. § 2241(c) provides in pertinent part:

> "The writ of habeas corpus shall not extend to a person unless —
>
> "(3) He is in custody in violation of the Constitution or law or treaties of the United States; * * *"

Texas Code of Criminal Procedure Article 11.01 et seq provides in pertinent part:

> "The writ of habeas corpus is the remedy to be used when any person is restrained of his liberty."

BLEED THROUGH

STATEMENT OF THE CASE

This case involves important procedural questions concerning the rights of persons in custody pursuant to a judgment of a state court to a speedy and efficient adjudication of the lawfulness of such custody under the Constitution of The United States. Because Petitioner's claims have not been adjudicated on the merits by the Court of Appeals, a brief sketch of her substantive claims will suffice for purposes of this petition.

On January 6, 1967, Petitioner entered a plea of guilty to the offense of burglary in the Criminal District Court Number Four, in Dallas County, Texas, for which she was sentenced to three years confinement in the Texas Department of Corrections.

The case was appealed to the Texas Court of Criminal Appeals in Austin, Texas, and Petitioner posted an appeal bond in the amount of $3,000 secured by a home owned by Petitioner's mother and father. The appeal was timely prosecuted.

On December 13, 1967, the Texas Court of Criminal Appeals affirmed the case and the mandate was issued on December 29, 1967. The time at which the clerk of Criminal District Court Number Four received the mandate is uncertain, but the mandate was received and negligently filed among the court papers concerning unrelated matters by the clerk of the court, now deceased.

The mandate was inadvertently discovered on February 20, 1974, at which time the present clerk issued a capias for Petitioner's arrest on the basis of the 1967 conviction.

On September 5, 1974, Petitioner was stopped by a Dallas Police Officer for operating a vehicle with an expired safety inspection sticker and upon a routine check of outstanding warrants was arrested pursuant to the above-mentioned capias.

On September 19, 1974, Petitioner filed a writ of habeas corpus pursuant to Art. 11.01 et seq Texas Code of Criminal Procedure.

The grounds for issuance of the writ of habeas corpus were, (1) that there was no evidence to support the plea of guilty as there were no written stipulations of evidence, as required by statute, (2) that the oral stipulations dictated into evidence were not authorized under the statute, (3) that through accident, omission or negligence of law enforcement or court officers, Petitioner was denied the right to prosecute an effective appeal because had she been aware of the affirmance of her appeal she might have petitioned the appeals court for hearing on points of no evidence, and (4) that the seven year delay in the enforcement of the mandate of the appeals court constituted cruel and unusual punishment.

The hearing on the writ of habeas corpus revealed that:

(1) Petitioner's parents had pledged a house to secure Petitioner's appeal bond.

(2) That the house was sold in 1970, but prior to sale, Petitioner's parents inquired concerning the propriety of the sale but no information concerning the bond or their daughter's case could be located and the house was sold.

(3) The above-mentioned appeal bond was never forfeited.

(4) During the seven year period, Petitioner maintained a permanent mailing address at her parents' home and checked her mail at least once each week.

(5) In 1969, Petitioner was charged with possession of marijuana and prior to trial, which resulted in a hung jury and was subsequently dismissed, made eight to twelve appearances in court and was never informed of the affirmance of her 1967 conviction.

(6) Except for the marijuana arrest, Petitioner was never again handled for a criminal violation.

On October 17, 1974, the Judge of Criminal District Court Four found in favor of Petitioner regarding her contention that the oral stipulations were invalid and recommended that

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the Texas Court of Criminal Appeals grant Petitioner's writ of habeas corpus and release her from confinement.

The statement of facts from the hearing and findings, conclusions, and recommendation of the Judge were transmitted to the Texas Court of Criminal Appeals pursuant to Article 11.01 et seq.

Despite the recommendation, the Court of Criminal Appeals denied Petitioner's writ of habeas corpus without written opinion.

On December 16, 1974, Petitioner filed for habeas corpus relief in the United States District Court, Northern District of Texas, Dallas Division pursuant to 28 U.S.C. § 2254. Petitioner requested relief on the same factual basis relied on in the state court but instead of raising the issue of no evidence or other issues raised in the state court she contended that the seven year delay in enforcement of her sentence constituted a denial of the due process guaranteed her by the 14th Amendment and fundamental justice concepts thereunder and reques ed that the court, pursuant to 28 U.S.C. § 2254, excuse further requirements to exhaust state remedies because there was an existence of circumstances rendering such process ineffective to protect the rights of Petitioner in that the Court of Criminal Appeals had recently decided an identical case in which relief was denied.

Petitioner referred to the case of *Ex Parte Francis*, 510 S.W. 2d 345, appearing at pages A-5 through A-9 in the Appendix decided by the Texas Court of Criminal Appeals on June 12, 1974. The Texas Court of Criminal Appeals in *Ex Parte Francis* dealt with the same factual issues involving a delay of eight years. In *Ex Parte Francis*, the petitioner alleged that his rights under Section 1 of the 14th Amendment had been violated, which was the same constitutional issue relied on by Petitioner in this cause in the Federal forum.

On February 28, 1975, the district court entered an order releasing Petitioner from the custody of the Sheriff of Dallas County, Texas upon the posting of a $3,000 cash bond pending determination and hearing of Applicant's Writ of Habeas Corpus presently before the Court.

On April 2, 1975, an order of dismissal was entered in the United States District Court holding that Petitioner had failed to exhaust remedies because the case of *Ex Parte Francis* was sufficiently distinguishable from the case at bar in that the petitioner in that case had knowledge of the affirmance of his case, whereas the record in the case at bar reflected that Petitioner had no such knowledge.

Petitioner noted her appeal from this decision and a certificate of probable cause was granted by the district court. The Court of Appeals for the Fifth Circuit considered the case on the briefs submitted by Petitioner and Respondent without oral argument. On November 21, 1975, it rendered its decision affirming the district court's dismissal. On January 7, 1976, the petition for rehearing was denied.

REASONS FOR GRANTING THE WRIT

By requiring a petitioner in custody under a state court conviction to file successive habeas corpus petitions merely because a slight factual dissimilarity exists in Petitioner's case and a case recently decided adversely to Petitioner's position, the Court of Appeals has decided an important question of federal law either contrary to the applicable decisions of this Court or has decided a question which heretofore has not, but should be decided by this Court.

Under 28 U.S.C. § 2254(b)(c), it is axiomatic that a petition for habeas corpus by a person in state custody will not be granted unless state court remedies have been exhausted. Although mere anticipation of an adverse decision will not excuse a failure to exhaust, nor will the lack of probability of success, the exhaustion remedy is not absolute. Where there are circumstances rendering the state corrective process ineffective to protect a prisoner's rights, habeas corpus relief may be granted without requiring a futile exhaustion of remedies. Such circumstances were found to exist where state court has ruled contrary to petitioner's contentions when there was no indication that the court was prepared to depart from its former course of decisions.

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Lucas v. People of State of Michigan, 420 F. 2d 259 (6th Cir., 1970), *Allen v. Perini*, 424 F. 2d 134 (6th Cir., 1970).

An almost identical fact situation existed in *Ex Parte Francis*, 510 S.W. 2d 345 (Tex. Crim. App., 1974). In that case relief was sought on several grounds, one of which was denial of due process under the 14th Amendment. The court denied relief sought without addressing petitioner's point on denial of due process. It is evident that if Petitioner in this cause were again to petition the Court of Criminal Appeals for relief from her conviction on grounds of denial of due process, such application would amount to no more than a petition to the Court of Criminal Appeals to rehear *Ex Parte Francis*, and since nothing new would be presented by Petitioner Vickery there would be no reason to suppose that the court would be disposed to reconsider its very recent decision. Exhaustion of state remedies does not require an exercise in futility. *Evans v. Cunningham*, 335 F. 2d 491 (4th Cir., 1964); *Woodall v. Pettibone*, 465 F. 2d 49 (4th Cir., 1972).

Petitioner Vickery has once petitioned the Court of Criminal Appeals for relief from the same facts but on grounds of no evidence and relief was denied. In light of *Ex Parte Francis*, to require her to file another writ in state court based upon due process grounds would amount to nothing more than to require her to invoke an ineffective process and result in further delay.

More than nine years have elapsed since Petitioner entered her plea. State remedies have been exhausted to the extent that any further requirement to exhaust state remedies will serve only to cause Petitioner to invoke an ineffective process resulting from the filing of successive applications in the state court, all of which is contrary to the spirit and letter of the statutes which guarantee the availability of the "Great Writ" to those persons illegally restrained of their liberty. The precise constitutional issue upon which Petitioner would rely has been presented to the Texas Court of Criminal Appeals in *Ex Parte Francis* and that Honorable Court has been given an opportunity to decide the constitutional issue prior to submitting the same to the federal court, thus satis-

fying the requirements of *Picard v. Conner*, 404 U.S. 270, 92 S. Ct. 509, 30 L. Ed. 438 (1972).

The order of dismissal entered in the United States District Court does not seem to dispute the argument presented, at least to the extent that it is summarized above. However, the reasoning of the order of dismissal is found in the following:

> "If in an identical case, the state's highest court has recently rendered a decision adverse to a federal habeas corpus petitioner, and there is no reason to believe that the state court will change its position, a federal court should not dismiss a petition for habeas corpus for failure to exhaust state remedies. *Layton v. Carson*, 479 F. 2d 1275, 1276 (5th Cir., 1973). However, the case *sub judice* is sufficiently distinguishable from the Texas case of *Ex parte Francis*, 510 S.W. 2d 345, (Tex. Crim. App. 1974) that exhaustion is not excused. In *Francis* the Texas Court of Criminal Appeals attached significance to the fact that petitioner knew that a mandate had issued. In this case, however, the record reflects that applicant had no such knowledge."

The petition was then ordered dismissed for failure to exhaust state remedies.

Petitioner's petition for habeas corpus was dismissed because of the aforementioned distinction discerned by the Judge of the United States District Court below. Although the distinction does apparently exist, Petitioner would emphatically disagree with the materiality of the distinction and the weight accorded this distinction in the district court below. It is respectfully submitted that the cases involving identical points of law are few and far between, which cannot be factually distinguished in some respect however minor or insignificant the distinction might be. The distinction determined to exist in the court below would be of no importance to the Texas Court of Criminal Appeals in deciding Petitioner's case were it again to be submitted on grounds of unreasonable delay in the enforcement of the sentence.

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There can be absolutely no doubt that the decision would be adverse to Petitioner.

Petitioner has found only four cases in Texas law which deal with the issue involved herein. Three of these cases are cited in *Ex Parte Francis*. The law in Texas is clear and cannot be disputed. Delay for any reason will not override the public interest derived from the punishment of those persons convicted of crimes. More specifically, the public interest is paramount even where delay has been occasioned by either the illegal act or the negligence of officials. To protect the public interest, the decisions of the Texas cases involving delay are based upon the conditions of the bail bonds posted to secure the freedom of the appellant during the pendency of the appeal. It has been consistently reasoned in the Texas cases that the defendant in such fact situations was under a duty to surrender himself to the sheriff whenever his case was affirmed.

Aside from the conditions of the bail bond, an examination of Texas Code of Criminal Procedure § 44.05 reveals that the duty of the clerk and the sheriff are absolute, that is that upon receipt of the mandate the capias *shall* issue and the sheriff *shall* forthwith execute the capias. (Emphasis added) It is impossible for Petitioner to conceive that, in view of the mandatory language contained in § 44.05, knowledge or lack of knowledge of the affirmative could affect these absolute duties and inevitabilities of arrest and confinement under Texas law. The courts in Texas have adopted and adhered to the position that a defendant must suffer the sentence irrespective of any delay in the imposition of the sentence.

Other jurisdictions have adopted the rule that under the particular facts presented, delay will relieve the defendant of the burden to suffer the penalty. The divergence in this area of the law is illustrated well in the case of *State ex rel Shotkin v. Buchanan*, 149 So. 2d 574 (Fla. App., 1973) which apears in 98 A.L.R. 2d 683 followed by an annotation the subject of which is "Effect of Delay in Taking Defendant into Custody After Conviction and Sentence." This annotation clearly shows that Texas is a jurisdiction in which the

sentence is enforced notwithstanding the delay. The fact of knowledge or lack of knowledge is not of sufficient import to cause the Texas Court of Criminal Appeals to depart from its holdings in prior cases. Quite obviously, if given the opportunity to argue the merits of her case, Petitioner would wholeheartedly disagree with the absolute position taken by the Texas Court of Criminal Appeals in cases of this nature pointing out the harsh and inequitable results obtained under Texas law.

In this case, of course, we are not concerned with affirmative action involving unauthorized release or excuse from service of sentence by officials, but even if we were dealing with a case involving delay of enforcement occasioned by illegal action of an official, the contention cannot be advanced under the reasoning in the Texas cases that knowledge or lack of knowledge by the Appellant of such illegal action could in any way estop the State of Texas from enforcing the sentence. By the same token, where the delay has been occasioned by the negligence of law enforcement or court officers, knowledge or lack of knowledge could not affect the outcome of a case decided under existing Texas law.

In the case at bar, Petitioner was allowed to remain at large during the appeal by posting bond. The appeal bond posted by Petitioner appears to be substantially similar to the bond posted in *Ex Parte Francis*, a portion of which was excerpted and is found in footnote number 1. at 510 S.W. 2d 347, wherein the material condition of the bond is stated as follows:

> 1. "Shall appear before this Court from day to day and from term to term of the same and not depart without leave of the Court in order to abide the judgment of the Court of Criminal Appeals of the State of Texas."

Texas decisions impose an absolute duty on the appellant to appear under the conditions of the bond. Petitioner can find nothing in the wording of the bond that states the appellant must be notified by the court to appear, but rather, continued freedom was conditioned on the fact that she must

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appear at any time or place as required by the Code of Criminal Procedure or the courts having jurisdiction of the case. Although petitioner in *Ex Parte Francis* knew of the affirmance and the court, in essence, found that he had caused his own hardship by failure to appear upon affirmance of the case, Petitioner would submit that because of the Texas Court of Criminal Appeal's strict adherence and emphasis on the duty of the appellant to comply with the conditions of the bail bond that even if Petitioner Francis had not known of the issuance of the mandate, that the outcome of the case would have been the same. In support hereof, Petitioner would respectfully direct the Court's attention to *Ex Parte Francis* at p. 346 wherein the court cites language from previous cases as follows:

> "The appeal bond which the appellant executed required that he appear before the court in which the judgment was rendered and abide by the judgment of the Court of Criminal Appeals in this case. It was by reason of this bond that he was allowed to remain at large pending his appeal, and if he had obeyed his terms, doubtless the sheriff would have put him in jail, but having failed to do so, we find no warrant in the law for the conclusion that he has satisfied the judgment against him. * * * "
>
> "A duty likewise rested upon the appellant and the sureties on his recognizance. He might have paid the fine or surrendered himself; so might the sureties. None of the officers of the state had the right to affirmatively release the appellant or waive the state's right to the satisfaction of the judgment of the court. They having no right to do so by affirmative action, it is our opinion that their negligence in performing the duties which the law imposed upon them would not operate to discharge the appellant from the necessity of suffering the penalty imposed upon him by the judgment of conviction. * * * "
>
> "In all of these cases the courts have denied the petitioner's application for release on habeas corpus, and have required the prisoner to serve his term notwithstanding the delay. * * * "

> "Any other holding under the facts in the case at bar would permit ministerial officers to thwart and nullify the judgment of courts. * * * "
>
> "The people of a state are interested in punishment of those convicted of crimes and public interest should not be subservient to illegal acts and default of officers who had charge of prisoners. * * * "

The decision in *Ex Parte Francis* rests upon these statements of law. The statements do not contain any wording to support the contention that had Petitioner Francis not known of the affirmance the decision would have been different. Nor can any inference be drawn to such effect.

It is conceded that the case at bar and *Ex Parte Francis* may be distinguished in respect to this point involving knowledge or lack of knowledge. Petitioner would further submit that had Petitioner been allowed to argue in the United States District Court the merits of her petition for writ of habeas corpus the issue of her lack of knowledge would have been of paramount importance and the thrust of her argument would lie in the fact that, aside from the conditions of her bond upon which Petitioner would attach little significance, the delay was not caused by fault attributable to her but rather by the negligence of the clerk and the unreasonable delay caused thereby. Petitioner would have further argued that the imposition of the prison sentence after the unreasonable delay of seven years, which was occasioned by the negligence of court personnel without fault attributable to Petitioner constitutes a violation of the Due Process clause of the 14th Amendment of the United States Constitution and the concepts of fundamental justice thereunder. However, Petitioner in this brief is not concerned with arguing the merits of her cause but rather she is concerned with convincing this Honorable Court that for her to present these same facts to the Texas Court of Criminal Appeals would amount to an exercise in futility. That her knowledge or lack of knowledge of the affirmance could have no effect on the outcome of her case submitted to the Texas Court of Criminal Appeals under Texas law.

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The Texas Court of Criminal Appeals has very recently decided a case which illustrates well the futility of requiring Petitioner to go back through the state courts. *Ex Parte Esquivel*, No. 51047, ... S.W. 2d ....," appearing at pages A-10 through A-14 in the Appendix, was decided on January 7, 1976." The case involved basically the same factual circumstances with which Petitioner is faced except that Esquivel received two convictions and two concurrent sentences. In 1960, Esquival went to the penitentiary on the five year sentence and appealed the conviction imposing the life sentence. The appeal was affirmed and the mandate issued, however, the clerk failed to file the mandate. The clerk's error was not discovered until 1973. Esquivel discharged the five year sentence in 1963, and subsequently went to the penitentiary three more times. The State of Texas sought to impose the 1960 life sentence on Esquivel and he petitioned for a writ of habeas corpus under the state statute to vacate and set aside the life sentence.

It was stipulated that Petitioner did not have knowledge of the affirmance of his 1960 case. The Texas Court of Criminal Appeals refused to vacate and set aside the life sentence but did, however, order the Texas Department of Corrections to give Esquivel "flat time" and "good time" sentence credit from the date of sentencing since May 3, 1960. In footnote five of *Ex Parte Esquivel*, the Texas Court of Criminal Appeals distinguished its holding from that of *Ex Parte Francis* in that Petitioner Francis was never required to serve any of his sentence until after the appellate process.

Petitioner Esquivel had no knowledge of the affirmance of his conviction just as Petitioner Vickery had no knowledge of the affirmance of her conviction. Petitioner in *Ex Parte Francis* did have knowledge of the affirmance of his conviction. The Texas Court of Criminal Appeals refused to vacate or set aside any of the sentences irrespective of any of the petitioners' knowledge or lack of knowledge, however, Petitioner Esquivel did receive certain sentence credits because he had been to the penitentiary between the time of

his sentencing and discovery of the clerical error which resulted in the 13 year delay.

The issue of denial of due process under the 14th Amendment was raised in *Ex Parte Francis* and presented to the Texas Court of Criminal Appeals, which declined to even address the point in its written opinion. Denial of due process was also raised in *Ex Parte Esquivel.* Once the federal claim has been fairly presented to the state courts, the requirement that state remedies be exhausted is satisfied. *Picard v. Conner* (infra). The Texas Court of Criminal Appeals has been afforded the opportunity to resolve the constitutional issues. All that is required to be done is to give the state court an opportunity to pass on the issue. There is no reason to believe that if Petitioner were again required to seek relief in the state court that her petition would not receive the same summary treatment as before.

CONCLUSION

For the reason set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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PROOF OF SERVICE

THE STATE OF TEXAS

COUNTY OF DALLAS

BEFORE ME, the undersigned Notary Public in and for Dallas County, Texas on this day personally appeared JOHN F. JORDAN, who being by me duly sworn, upon oath stated: I, JOHN F. JORDAN, am a member of the Bar of the Supreme Court of the United States and am one of the attorneys of record for Petitioner herein.

I further state upon oath that upon the 14th day of February, 1976, I served copies of the foregoing Petition for Writ of Certiorari on the Respondent W. J. ESTELLE, JR., by depositing the same in the United States Mail, with first class postage prepaid, addressed to the following counsel of record in the courts below, at the address indicated, to-wit:

Mr. Herman Little, Jr.
Assistant Attorney General
Post Office Box 12548, Capitol Station
Austin, Texas 78711

JOHN F. JORDAN

SUBSCRIBED AND SWORN to before me by the said JOHN F. JORDAN, this 14th day of February, 1976.

Notary Public in and for
Dallas County, Texas

BLEED THROUGH

U. S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
APR. 2, 1975
JOSEPH McELROY, JR., CLERK
BY JANE STUART,
DEPUTY

IN THE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

MARY FRANCES VICKERY

v.

W. J. ESTELLE, JR., Director
Texas Department of Corrections

CIVIL ACTION NO. CA-3-74-1234 D

ORDER OF DISMISSAL

After making an independent review of the entire file in the above styled case, and after consideration of the findings and recommendation of the United States Magistrate the court is of the opinion that the applicant's petition for a writ of habeas corpus should be dismissed without prejudice.

Though the facts of this case were presented to the state courts, applicant's constitutional claim asserted herein was not brought to their attention. The applicant applied for a writ of habeas corpus in Criminal District Court No. 4 of Dallas County, Texas in October 1974. That district court on October 17, 1974 entered its findings of fact and conclusions of law, recommending that the Court of Criminal

Appeals grant the writ because of a procedural error. The Court of Criminal Appeals however, without opinion denied the writ.

Applicant did not contend in the state court that the delay in incarceration denied her due process of law. The substance of a federal habeas corpus claim must first be presented to the state courts and factual sameness will not support a holding that constitutional assertions have been exhausted. *Picord v. Connor*, 404 U.S. 270, 278, 30 L. Ed. 2d 438, 445 (1971); *Minafee v. Estelle*, 491 F. 2d 1096 (5th Cir. 1974).

If, in an identical case, the state's highest court has recently rendered a decision adverse to a federal habeas corpus petitioner, and there is no reason to believe the state court will change its position, a federal court should not dismiss a petition for habeas corpus for failure to exhaust state remedies. *Layton v. Carson*, 479 F. 2d 1275, 1276 (5th Cir. 1973). However, the case *sub judice* is sufficiently distinguishable from the recent Texas case of *Ex Parte Francis*, 510 S.W. 2d 345 (Tex. Crim. App. 1974) that exhaustion is not excused. In *Francis* the Texas Court of Criminal Appeals attached significance to the fact that petitioner knew that a mandate had issued. In this case however, the record reflects that applicant had no such knowledge.

It is therefore ORDERED that applicant's petition for writ of habeas corpus is dismissed without prejudice to her right to exhaust her available state remedies, and to reapply for federal habeas corpus relief after exhaustion of those state remedies, if necessary.

Dated this 2nd day of April, 1975.

Robert M. Hill
United States District Judge

IN THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

No. 75-2570

Summary Calendar*

MARY FRANCES VICKERY,
Petitioner-Appellant,

v.

W. J. ESTELLE, JR., Director,
Texas Dept. of Corrections,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Texas

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(November 21, 1975)

BEFORE GEWIN, GOLDBERG and DYER, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1] It affirmatively appears from the record that appellant has failed to exhaust her state remedies.

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* Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 41 F. 2d 409, Part I.

[1] See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F. 2d 966.

Issued as Mandate:

U. S. COURT OF APPEALS
FILED
JAN. 7, 1976
EDWARD W. WADSWORTH
CLERK

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 75-2570

MARY FRANCES VICKERY,
Petitioner-Appellant,

v.

W. J. ESTELLE, JR., Director,
Texas Dept. of Corrections,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING

(January 7, 1976)

BEFORE GEWIN, GOLDBERG and DYER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

FILED THROUGH

EX PARTE BILLY EDWARD FRANCIS

510 S.W. 2d 345

No.48648.

Court of Criminal Appeals of Texas.
June 12, 1974.

Prisoner petitioned for writ of habeas corpus on ground that he was entitled to be relieved of duty of serving two-year sentence following judgment of conviction by the 99th Judicial District Court of Lubbock County, Howard C. Davison, J. The Court of Criminal Appeals, Morrison, J., held that petitioner was not entitled to release although he was not taken into custody for eight years after affirmance of conviction.

Petition denied.

Criminal Law 1216(6)

Where defendant was out on bond pending appeal of judgment of conviction for forgery for which his punishment was assessed at two years and conviction was affirmed and it was not until more than eight years after affirmance that authorities realized that defendant was not arrested on mandate of court or carried to the Department of Corrections as required, defendant was not entitled to be relieved from duty to serve sentence.

John T. Montford, Lubbock, for appellant.

Jim D. Vollers, State's Atty., Austin, for the State.

OPINION

MORRISON, Judge.

Petitioner, an inmate of the Department of Corrections, seeks his release by writ of habeas corpus.

Petitioner was convicted in the District Court of Lubbock County of the offense of forgery on the 16th day of July, 1964. His punishment was assessed at two years, and he appealed to this Court. This Court affirmed the conviction by Per Curiam opinion and on the 12th day of February, 1965, forwarded our mandate to the clerk of the convicting court.

We are unable to determine from the record on the hearing on the writ of habeas corpus and from the court's finding of fact which accompanies such record whether the clerk of the convicting court forwarded such mandate to the sheriff of Lubbock County or not, nor do we deem it necessary to so determine. Regardless of which official was derelict in his duty, the fact remains that the appellant was not arrested on the mandate of this Court, nor was he carried to the Department of Corrections as the law requires. It was not until November 2, 1973, that this oversight was discovered.

Petitioner was then arrested on the original mandate of this Court and, following the hearing before the trial court on a writ of habeas corpus, he was transferred to the Department of Corrections, where he is now confined.

This case should not be confused with cases where the State was the moving party in bringing about the prinsoner's unwarranted release. Cf. Ex Parte Morgan, 159 Tex. Cr. R. 241, 262 S.W. 2d 728.

At the hearing the petitioner testified that he learned of the affirmance of his conviction by this Court at the time and that he conferred with his bondsman. He does not assert that he made his appearance before the convicting court as was required by the terms of his bond.

Judge Morrow in writing for this Court concerning a similar state of facts, in Ex Parte Underwood, 94 Tex. Cr. R. 157, 248 S.W. 2d 551, said:

> "The appeal bond which the appellant executed required that he appear before the court in which the judgment was rendered and abide by the judgment of the Court of Criminal Appeals in this case. It was by reason of

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> this bond that he was allowed to remain at large pending his appeal, and if he had obeyed his terms, doubtless the sheriff would have put him in jail, but having failed to do so, we find no warrant in the law for the conclusion that he has satisfied the judgment against him."

Soon thereafter when again writing for the Court in Ex Parte Salisbury, 98 Tex. Cr. R. 341, 265 S.W. 696, Judge Morrow said:

> "A duty likewise rested upon the appellant, and the sureties on his recognizance. He might have paid the fine or surrendered himself; so might the sureties. None of the officers of the state had the right to affirmatively release the appellant or waive the state's right to the satisfaction of the judgment of the court. They having no right to do so by affirmative action, it is our opinion that their negligence in performing the duties which the law imposed upon them would not operate to discharge the appellant from the necessity of suffering the penalty imposed upon him by the judgment of conviction."

See also Rayburn v. State, 146 Tex. Cr. R. 204, 172 S.W. 2d 505.

In Weber v. Mosley, 241 Mo. App. 727, 242 S.W. 2d 273, the St. Louis Court of Appeals wrote an exhaustive opinion from which we quote in part:

> "In still others, [cases where the accused has not been promptly confined under the judgment of the court] after conviction is affirmed by the appellate court (defendant having been out on bond pending appeal) a delay occurs in taking him into custody, and the question arises whether the period of the delay is to be credited on the sentence. Ex Parte Underwood, 94 Tex. Cr. R. 157, 248 S.W. 551; Ex Parte Volker, 120 Neb. 508, 233 N.W. 890, 72 A.L.R. 1267; People ex rel. Kelly v. Ragen, 392 Ill. 423, 64 N.E. 2d 872; Ex Parte Hill, 86 Okl. Cr. 318, 192 P. 2d 849.

> "In all of these cases the courts have denied the petitioner's application for release on habeas corpus, and have required the prisoner to serve his term notwithstanding the delay."

Later in the opinion, we find the following:

> "Any other holding under the facts in the case at bar would permit ministerial officers to thwart and nullify the judgment of courts."

We quote from 24B C.J.S. Criminal Law § 1999, p. 688, as follows:

> "The people of a state are interested in punishment of those convicted of crimes and public interest should not be subservient to illegal acts and default of officers who had charge of prisoners."

In a brief filed for the first time in this Court petitioner makes several assertions, some of which wil be discussed. He first contends that he was denied his constitutional right to a speedy trial and appeal. A recitation of the facts reflects that petitioner's trial and appeal were promptly disposed of and the reason he is now incarcerated is that he failed to take appropriate action when he learned that his conviction had been affirmed. Had he complied with the terms of his bond on appeal,[1] he would have long since served his sentence.

One of petitioner's contentions is that he has been "in custody" for the purpose of serving his sentence while on bond awaiting the action of this Court. He relies upon the recent opinion of the Supreme Court of the United States in Hensley v. Municipal Court, 411 U.S. 345, 93 S. Ct. 1571, 36 L. Ed. 2d 294 (1973). The Court there was construing the term "in custody" in order to determine petitioner's eligibility for writ of habeas corpus and not as credit for time served in jail.

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[1] "Shall appear before this Court from day to day and from term to term of the same and not depart without leave of the Court in order to abide the judgment of the Court of Criminal Appeals of the State of Texas."

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Smith v. Swope, 9 Cir., 91 F. 2d 260, also relied upon by petitioner, is not in point because in that case petitioner was arbitrarily placed in the custody of another jurisdiction, and the court held that he should have been given credit for such time.

After full review of all of petitioner's contentions, we have concluded that the petitioner is not entitled to the relief prayed for. It is so ordered.

NO. 51,047.

S.W. 2d

Ex parte

ARTURO T. ESQUIVEL

Habeas Corpus Application
from Bexar County
Attorney: Stanley G. Schneider

OPINION

This is a post conviction application for writ of habeas corpus filed pursuant to Art. 11.07, C.C.P.

Petitioner was convicted of murder with malice and assessed a term of life imprisonment. He was also convicted of robbery by assault and received a 5-year sentence. Petitioner's writ of habeas corpus alleges he was denied due process of law and subjected to multiple punishments by being denied certain time credits toward parole eligibility[1] of the life sentence.

The factual circumstances involved in petitioner's allegations are as follows:

> (1) On Feb. 16, 1960, petitioner was convicted on his plea of not guilty to the jury to the offense of robbery by assault in Cause No. S-58548 and assessed punishment of 5 years.
>
> (2) On March 21, 1960, petitioner was convicted of the offense of murder, after his plea of not guilty to a jury, in Cause No. S-58519, and assessed a life term of imprisonment.
>
> (3) On May 3, 1960, petitioner was sentenced in both of the above-mentioned cause numbers and given 5-year and life terms, respectively, with no notice of

[1] Since a "life" sentence can never be discharged, the only necessity for computing time credits toward this life sentence would be to determine parole eligibility.

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appeal being given in the robbery case but with a direct appeal perfected in the murder case.

(4) On May 4, 1960, petitioner was transferred to the Texas Department of Corrections to begin serving his 5-year sentence for robbery during the pendency of his appeal in the murder conviction.

(5) On Nov. 9, 1960, this Court, in our appeal #32,451, affirmed petitioner's conviction in a per curiam opinion. The mandate of this Court in that case was issued on Nov. 25, 1960, commanding Criminal District Court #2 of Bexar County to execute the judgment and sentence in trial court Cause No. S-58519. *However, due to some clerical error on the part of the district clerk's office in Bexar County, the mandate of this Court was never filed with the district court, and as a result, the Texas Department of Corrections was never notified of the existence of petitioner's life sentence.*

(6) Petitioner remained in the Texas Department of Corrections until April 14, 1963, at which time he discharged his 5-year robbery sentence.

(7) Over the next few years, petitioner was convicted of two other felony offenses, serving time in the Texas Department of Corrections, and discharging these sentences on two occasions.[2]

(8) The clerical error which resulted in the Texas Department of Corrections not being aware of the existence of the life sentence assessed in Cause No.

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[2] The records reflect that petitioner was convicted in Cause #64262 of the offense of burglary and assessed a 5-year term of imprisonment, said sentence beginning on Jan. 5, 1965. He discharged this sentence on Jan. 2, 1968.

On April 3, 1969, petitioner was sentenced in Cause #68-763 to a 6-year sentence for theft, and discharged this term of imprisonment on July 18, 197..

Additionally, petitioner was convicted a fifth time and assessed a 7-year term of imprisonment on April 5, 1973, in Cause #73-CR-252 for the offense of burglary. The petitioner is still under confinement in the Texas Department of Corrections on this 7-year sentence.

> S-58519 was not discovered until apparently 1973, with the mandate not being filed with the Bexar County District Clerk's Office until April 3, 1973. As a result of this late filing of this mandate, petitioner's sentence in Cause No. S-58519 did not begin until Feb. 21, 1973.

Petitioner argues he has been denied many years of time credit toward parole eligibility of the life sentence because of the clerical error in failure to notify the Texas Department of Corrections of the existence of the life sentence. Petitioner asks for a complete cancellation and nullification of the life sentence, relying on Shields v. Beto, 370 F. 2d 1003 (5th Cir.), and Clifton v. Beto, 411 F. 2d 1226 (5th Cir.)

The trial court found, based upon stipulations between the State and petitioner, that petitioner had no knowledge that the life sentence was still an effective conviction until the clerical error was finally discovered, and that petitioner was not at fault in his premature release from the Texas Department of Corrections. The trial court further found that petitioner's sentence in Cause No. S-58519, the conviction for murder, should begin as of Nov. 24, 1959, the date of petitioner's original confinement.[3]

The record shows a clerical error in the Bexar County District Clerk's Office effectively caused the officials of the Texas Department of Corrections to release petitioner from that institution on three separate occasions, without any of the parties concerned having knowledge of the valid and existing life sentence outstanding against petitioner. Under these circumstances, Ex Parte Downey, 471 S.W. 2d 576, is controlling. When the terms of imprisonment run concurrently, as in the case at bar, sentence shall begin to run on

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[3] The trial court's granting additional back jail time credit to Nov. 24, 1959, cannot be sustained, at least under the record before this Court, inasmuch as none of the records reflect that the trial court originally intended to grant petitioner pre-sentence jail time credit. Without some indication that the trial court originally intended petitioner to have pre-sentence jail time credit, the trial court is without authority to grant such credit at this time. See Ex Parte Washburn, 459 S.W. 2d 637; Vessels v. St., 467 S.W. 2d 259.

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the same day sentence is pronounced, and, absent an escape, a violation of parole or some fault on the part of the prisoner, said sentence must be continuous and the prisoner cannot be required to serve his sentence in installments. See Ex Parte Reynolds, 462 S.W. 2d 605; Ex Parte Lawson, 266 S.W. 1101; White v. Pearlman, 42 F. 2d 788 (10th Cir.); Ex Parte Morgan, 262 S.W. 2d 728; Ex Parte Griffin, 258 S.W. 2d 324. We hold petitioner is entitled to "flat time" credit toward his parole eligibility of the life sentence in Cause No. S-58519, as of May 3, 1960, the date of formal sentencing in that case.[4]

In addition, petitioner has earned certain "good time" credit during his previous commitments in the Texas Department of Corrections pursuant to Art. 6184(1), V.A.C.S. Although he was erroneously discharged from the Texas Department of Corrections on several occasions, we hold petitioner is nevertheless entitled to all "good time" credits accumulated during his prior commitments in the Texas Department of Corrections just as if he had been continuously serving the life sentence.[5] See North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, at fn. 13; Ex Parte Bennett, 508 S.W. 2d 646; Ex Parte Enriquez, 490 S.W. 2d 546.

For the reasons stated, petitioner's writ of habeas corpus has merit, and we hold that the Texas Department of Cor-

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[4] The statutory scheme in effect at the time of petitioner's initial confinement provided that, in cases in which a direct appeal was taken, sentence began to run the date the mandate issued from the Court of Criminal Appeals, with discretion in the trial judge to grant credit for time in jail pending appeal. This statutory scheme has been held deficient, and petitioner is constitutionally entitled to credit for jail time pending appeal. Robinson v. Beto, 426 F. 2d 799 (5th Cir.); Ex Parte Freeman, 486 S.W. 2d 556.

[5] The holding in this case is not in conflict with our holding in Ex Parte Francis, 510 S.W. 2d 345. In Francis the petitioner was convicted, sentenced and released on bond pending the outcome of his direct appeal. Due to a clerical error, petitioner was never notified as to the disposition of the appeal until many years later and he was then arrested and required to serve the remainder of his sentence. Francis was never required to serve any portion of his sentence until after the completion of the appellate process.

rections should make a correction of petitioner's records to reflect that the life sentence assessed in Cause No. S-58519 should begin as of May 3, 1960, with petitioner being given all "flat time" credit from that day forward; and that further, petitioner be additionally credited with any "good time" credit that he has accumulated since May 3, 1960, in the Texas Department of Corrections toward his parole eligibility date in the life sentence assessed in Cause No. S-58519. However, petitioner's request that the life sentence be vacated and set aside is denied, as petitioner has been granted all the relief to which he is entitled.

IT IS SO ORDERED, and copies of this opinion shall be sent to the Texas Department of Corrections.

Morrison, Judge

(Delivered January 7, 1976)

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MAY 5 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

* * *

NO. 75-1164

* * *

MARY FRANCIS VICKERY,

Petitioner

V.

W. J. ESTELLE, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent

* * *

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For
The Fifth Circuit

* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

* * *

NO. 75-1164

* * *

MARY FRANCIS VICKERY,

Petitioner

v.

W. J. ESTELLE, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent

* * *

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For
The Fifth Circuit

* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

JURISDICTION

The Petition appears to have been timely filed and to meet this Court's formal jurisdictional requirements. Respondent denies, however, that the criteria of Supreme Court Rule 19 governing the exercise of this Court's discretionary certiorari jurisdiction have been met.

QUESTION PRESENTED

The sole question presented by the instant Petition is whether it is so certain that the Texas Court of Criminal Appeals would reject Petitioner's application

for the writ of habeas corpus in that court that she is relieved of the exhaustion requirement of 28 U.S.C. § 2254(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those provisions cited by Petitioner, this Petition involves the provisions of 28 U.S.C. § 2254(b), to wit:

> An application for the writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

STATEMENT OF THE CASE

Respondent concurs in Petitioner's statement of the case.

ARGUMENT

A number of the Courts of Appeals have held that the exhaustion requirement of 28 U.S.C. § 2254(b) will not bar a federal habeas corpus applicant from presenting his or her claim without first resorting to the state courts if recent and unequivocal rulings of the highest court of the state make perfectly apparent the futility of presenting the applicant's claim to the state forum. *See, e.g., Mercado v. Rockerfeller*, 502 F.2d 666 (2d Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); *Layton v. Carson*, 479 F.2d 1275 (5th Cir. 1973); *Allen v. Perini*, 424 F.2d 134 (6th Cir. 1970). This Court as well has apparently recognized such an exception to the

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exhaustion requirement. *See Spencer v. Texas*, 395 U.S. 554 (1967), *aff'g Reed v. Beto*, 343 F.2d 723 (5th Cir. 1965). Petitioner herein claims that her case falls within the exception; Respondent submits that it does not.

It is not necessary for Respondent to argue Petitioner's case for the granting of the writ in order to prevail in its contention that exhaustion is necessary. If there is *any doubt* about the outcome of a state habeas corpus proceeding, Petitioner must afford the state courts an opportunity to consider her claim. Even the unlikelihood of success in the state court cannot excuse a failure to exhaust available state remedies. *Johnson v. Robinson*, 166 U.S. App. D.C. 62 (D.D.C. 1974); *Daegle v. Crouse*, 429 F.2d 503, 505 (10th Cir. 1970), *cert. denied*, 400 U.S. 1010 (1971); *Lucas v. Michigan*, 420 F.2d 259 (6th Cir. 1970); *Whiteley v. Meacham*, 416 F.2d 36 (10th Cir. 1969), *rev'd on other grounds sub nom. Whiteley v. Warden*, 401 U.S. 560 (1971); *Boyd v. Oklahoma*, 375 F.2d 481 (10th Cir. 1967); *Dana v. Tracy*, 360 F.2d 545 (1st Cir.), *cert. denied*, 385 U.S. 941 (1966).

Petitioner places principal reliance on *Ex Parte Francis*, 510 S.W.2d 345 (Tex. Crim. App. 1974), a case that she contends is identical to her own. Francis sought a writ of habeas corpus with the argument that an eight year delay between the affirmance of his conviction and the date on which he was arrested and began serving his sentence violated his right to due process of law. The Court of Criminal Appeals denied his petition, observing *inter alia* that Francis learned of the affirmance of his conviction soon after it was issued, but did not return to court or surrender himself to the authorities. *Id.* at 346-47. Hence Respondent argued in the district court and Court of Appeals below that Petitioner, who had no knowledge that her conviction had been affirmed, stands in a fundamentally different

position than did Francis and cannot conclude on the basis of *Ex Parte Francis* that the Court of Criminal Appeals would be bound to deny her application. Both courts agreed with Respondent's contention.

Petitioner now seeks to invoke a later decision of the Court of Criminal Appeals as a basis for establishing the futility of presenting her claim to that tribunal. In *Ex Parte Esquivel*, 531 S.W.2d 339 (Tex. Crim. App. 1976), the applicant had been simultaneously sentenced to a five year term for a robbery conviction and a life term for a murder conviction. He appealed the murder conviction and began to serve his sentence for the robbery. His murder conviction was affirmed but the mandate directing the execution of the judgment was misplaced and the affirmance was never communicated to the prison authorities or to Esquivel. Consequently, he was released after about three years of confinement. During the next ten years, Esquivel was in and out of prison twice on unrelated offenses, but (like Petitioner herein) was never informed of the affirmance of his murder conviction and never served any of the life sentence. Thirteen years after the life sentence was imposed, Esquivel was arrested and forced to begin serving it. On his application for habeas corpus relief, the Court of Criminal Appeals declined to relieve him altogether of the obligation to serve the life sentence, *but ordered that he be given credit on that sentence for all the time that had elapsed since the date of sentencing* (*not* merely for the time that he had actually been in prison during that period). Petitioner argues that the Court of Criminal Appeals' refusal to void Esquivel's sentence altogether signifies that her application to that court would surely fail. In fact, *Ex Parte Esquivel* betokens very good prospects for Petitioner's remedies in state court, for if Petitioner should be granted the same relief as was afforded Esquivel she would be free. Petitioner's

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sentence was for three years; more than nine years have now passed since her sentence was imposed. Hence, awarding her credit for time served as though she had been confined since the date of sentencing, the remedy the Court of Criminal Appeals fashioned for Esquivel, would result in her immediate discharge.

Respondent therefore submits that Petitioner's prospects before the Texas Court of Criminal Appeals are at best promising and at worst uncertain. Her own decision to circumvent state procedures has prevented that court from deciding the question that she seeks to bring to the federal courts. This Court ought not encourage Petitioner or other habeas corpus applicants to make such choices.

CONCLUSION

For all the reasons stated above, and for the further reason that the criteria set forth in Supreme Court Rule 19 governing the exercise of this Court's discretionary certiorari jurisdiction have not been met, Respondent submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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P. O. Box 12548, Capitol Station
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Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Joe B. Dibrell, Jr., Assistant Attorney General of Texas, do hereby certify that three copies of the above and foregoing Respondent's Brief in Opposition have been served by placing the same in the United States Mail, postage prepaid, certified, on this the _____ day of May, 1976, addressed as follows: John F. Jordan, 2818 Maple Avenue, #103, Dallas, Texas, 75201.

_____
JOE B. DIBRELL, JR.